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In the Supreme Court of the United States

OCTOBER TERM 1936

No. 97

THE UNITED STATES, PETITIONER

v.

PERCY K. HUDSON

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Claims is reported in 12 F. Supp. 620. Supplemental opinion overruling motion for new trial is reported in 13 F. Supp. 640.

JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1935. The order of the Court of Claims overruling the motion for a new trial was entered on March 2, 1936. The jurisdiction of

this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the application of the tax provided for in the Silver Purchase Act of 1934, enacted June 19, 1934 to transfers consummated on May 23 and May 29, 1934, is valid and constitutional under the due process clause of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix (*infra,* pp. 11–15).

STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

On May 3, 1934, respondent purchased futures contracts for the delivery of 500,000 ounces of silver, of which he sold contracts for 350,000 ounces on May 23, 1934, and 150,000 ounces on May 29, 1934, at a profit of $8,621.96. On July 30, 1934, respondent filed a silver tax return on the foregoing transactions pursuant to the Silver Purchase Act of 1934, see *infra,* p. 12, approved June 19, 1934, and duly paid a tax thereon in the amount of $4,311. On August 23, 1934, respondent filed claim for refund of the entire amount of tax so paid, which claim was duly rejected (Spl. Fdgs. of Fact).

Respondent brought suit in the Court of Claims on October 11, 1934, and on November 4, 1935, ob-

tained a judgment for $4,311, representing the entire amount of tax paid.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the application of the Silver Purchase Act of 1934 to a period prior to its enactment was arbitrary, invalid and unconstitutional under the due process clause of the Fifth Amendment.

2. In failing to hold that the application of the Silver Purchase Act of 1934 to a period prior to its enactment was a valid and proper exercise of the taxing power of Congress.

3. In holding that the Silver Purchase Act of 1934 as here applied could not be sustained as a necessary adjunct to the exercise of the monetary power of Congress.

4. In failing to hold that the Silver Purchase Act of 1934 as here applied could be sustained as an incident to the proper and valid exercise of the monetary power of Congress.

5. In giving judgment in favor of the respondent.

6. In failing to dismiss the petition and give judgment in favor of the United States.

REASONS FOR GRANTING THE WRIT

1. The sole issue in the case, as recognized by the lower court, is the power of Congress in the exercise of its revenue and monetary powers to tax

profits resulting from sales of silver made within a limited period (approximately one month) immediately prior to the enactment of a statute containing a similar tax as to such sales in the future and providing a comprehensive system for regulating the monetary value of silver. The case will not only control a considerable number of other instances in which taxes totalling approximately $400,000 are imposed by the Silver Purchase Act, but involves an important constitutional question of general applicability as to the power of Congress to prevent tax evasion or profiteering at the public expense on the basis of prospective revenue or monetary legislation, the enactment of which has become almost certain. The questions thus presented are, we submit, plainly of such importance as to warrant review by this Court.

2. The decision of the Court of Claims is in conflict with the principles applicable to tax legislation having retroactive effect enunciated by this Court in *Cooper* v. *United States*, 280 U. S. 409, and *Milliken* v. *United States*, 283 U. S. 15.

The sales of futures contracts here involved were already subjected to a transfer tax under subdivision 4 of Schedule A of Title VIII of the Revenue Act of 1926, as amended. Furthermore, the tax in fact is upon income resulting from silver transactions.[1] That income, like other income of

[1] It is to be noted that not only were the costs and certain expenses deductible, but during the retroactive period active traders in silver were in general permitted to offset losses

respondent's, was subject to the usual income tax, which might, it seems clear, have singled out particular classifications of income for special rates. See *R. Hoe & Co.* v. *Commissioner*, 30 F. (2d) 630 (C. C. A. 2d); *Updike* v. *United States*, 8 F. (2d) 913 (C. C. A. 8th); cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Shaffer* v. *Carter*, 252 U. S. 37, 55. The power of Congress to treat as income "gains from prior but recent transactions" cannot be questioned. *Cooper* v. *United States, supra*, p. 411; *Updike* v. *United States, supra*. Surely under these circumstances respondent "should be regarded as taking his chances of any increase in the tax burden." See *Milliken* v. *United States*, *supra*, p. 23.

Like that in the *Milliken* case, *supra*, the tax here assailed had a special justification. Aside from all other considerations, the retroactive provisions of the Silver Purchase Act of 1934 should be sustained, we submit, as an incident to the exercise of the powers of Congress (Cf. *Milliken* v. *United States, supra*, p. 24), particularly since the profit taxed was largely the result of governmental

against profits. T. D. 4450 and Coll. Mim. 4211 (published in XIII-2 C. B., at pp. 549 and 539, respectively). In view of the extensive powers of Congress with respect to the allowance of deductions (see *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, 381) the resulting tax was, it is submitted, an income tax within the meaning of the Sixteenth Amendment. Cf. *R. Hoe & Co.* v. *Commissioner*, 30 F. (2d) 630 (C. C. A. 2d). And see *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501; *Shaffer* v. *Carter*, 252 U. S. 37, 55.

action in the effectuation of a monetary policy and since the tax was expressly designed,[2] among other things, to protect the Government from unreasonable profiteering at its expense.

A brief recital of the oustanding events preceding the enactment of the Silver Purchase Act clearly reveals that this legislation was part of a unified program of the Government looking to the regulation of the currency of the nation and the development of an improved monetary system. By the Act of May 12, 1933 (48 Stat. 51) the Presi-

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[2] See the report of the House Ways and Means Committee (H. Rep. No. 1801, 73d Cong., 2d Sess., p. 3):

"By such acquisitions the price of silver and gold may also be brought into more proper adjustment. Such an increase in the price of silver will of necessity bring profits to private holders of silver, which profits will accrue through governmental action in the effectuation of a monetary policy for the entire country. It would be inequitable for a part of our people to take advantage of governmental action designed to benefit the country as a whole so as to reap large personal profits. The measure accordingly contains two safeguards. It provides that the Secretary of the Treasury may not pay more than 50 cents an ounce for any silver situated in the United States on May 1, 1934. It establishes a transfer tax of 50 percent of the profits arising out of the holding of silver or contracts for silver. Holders of silver are thus allowed a profit which should at least equal any profits arising from investments in silver or the purchase and sale of silver for industrial use during times when the price is not being increased by governmental action. The tax being in the nature of a profits tax covers transactions taking place prior to enactment. Were this provision not included in the bill, the policy of equitably reimbursing the Government for the increase which its action may bring to the price of silver could be easily obstructed."

dent was authorized to fix the weight of gold and silver dollars and the ratio between the two. In July, 1933, the London Silver Agreement (48 Stat. 1879, 1889), designed among other things to aid in controlling the world price of silver, was signed by delegates representing the principal silver-producing and silver using nations, including the United States. In December, 1933, by presidential proclamation (48 Stat. 1723) designed to carry out the terms of the London Agreement, the Federal mints were authorized to receive newly mined domestic silver for coinage.

On January 15, 1934 in recommending the enactment of the bill which became the Gold Reserve Act of 1934 (48 Stat. 337) the President stressed the importance of silver to the nation's monetary structure and, although withholding specific recommendations relating to silver until after the effects of the London Agreement and related measures became more apparent, envisaged a marked increase in our use of silver as a basis for currency (78 Cong. Rec. 643–644). Various bills providing for the acquisition of silver were before Congress in the ensuing months.[3] On May 22, 1934 the Pres-

[3] See, e. g., S. 3039, 3470, and 3658; H. Res. 293, 294, 303, and 339; H. R. 1577, 6158, 6485, 6854, 7320, 7475, 7581, 7832, 8054, 9242, and 9745, all of the 73d Congress, 2d session. H. R. 7581, providing for the exchange of agricultural surplus for silver bullion at a valuation up to 25 per cent above the world price, was passed by the House of Representatives on March 19, 1934 by a large majority. 78 Cong. Rec. 4863.

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ident recommended (78 Cong. Rec. 9209) the enactment of the measure which on June 19, 1934 became the Silver Purchase Act of 1934.

This message expressly recommended "a tax of at least 50 per cent on the profits accruing from dealing in silver." Manifestly, such a tax would serve as a limiting factor preventing undue rises in the price of silver due to speculative activity in anticipation of the recommended governmental acquisitions. Furthermore, as Congress expressly recognized (*supra*, p. 6, note), such a tax tended to reduce the governmental expense, by "equitably reimbursing the Government", for any increase in the price of silver to be acquired by the Government, which the silver program would entail. The efficacy of these incidents of the monetary program with respect to silver could undoubtedly have been "easily obstructed" (*supra*, p. 6, note) had the retroactive provisions not been made applicable at least to such transactions, as here, occurring after the Presidential message.

No discussion of the scope of the monetary powers of Congress is necessary here. The subject has been before this Court in notable recent decisions. See *Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330. In *Norman* v. *B. & O. R. Co.*, *supra*, this Court made this significant statement after dwelling upon the power of

Congress in relation to the currency of the nation (p. 304):

> Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310.

There it was further said (p. 311), referring to the judicial function in relation to the exercise of the monetary policy of Congress, "We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."

The case of *Veazie Bank* v. *Fenno,* 8 Wall. 533, cited with approval in the *Norman* case, was followed in *National Bank* v. *United States,* 101 U. S. 1, in which it was said (p. 6) with relation to a tax upon banks paying out notes of municipalities: "The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do."

The end in view was plainly legitimate and, we submit, that the means adopted was not so arbitrary or capricious as to violate the Fifth Amendment. The reasonableness of the taxing provisions—both the prospective and the retroactive

provisions—as aiding the achievement of the Congressional monetary policy seems apparent. The further purposes of safeguarding the Government against speculative profiteering at its expense and against tax evasion (See *Milliken* v. *United States, supra,* pp. 23, 24), as well as of equalizing the effects of the monetary program upon all citizens, furnish independent grounds for justifying the legislation here assailed.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims should be granted.

STANLEY REED,
Solicitor General.

JUNE 1936.

APPENDIX

Treasury Regulations 85:

ART. 70. Returns.—Every person who on or after May 15, 1934, and before the enactment of the Silver Purchase Act of 1934 made any transfer of any interest in silver bullion shall, on or before July 18, 1934, file with the collector for the district in which is located his principal place of business (or, if none, his residence) or if he has no principal place of business or residence in the United States, with the collector at Baltimore, Md., a return in duplicate under oath on form 4 (silver) showing all such transfers and the following facts with respect to each:

(a) Date of the transfer.

(b) Name and address of transferee (except in the case of a futures contract liquidated by an offsetting futures contract).

(c) The interest in silver bullion transferred or to be transferred.

(d) The price for which such interest was or is to be transferred.

(e) The date and manner of acquisition (or production when that is the basic date).

(f) The cost of such interest (except as provided in art. 72). The facts upon which the cost is based shall be stated in detail.

(g) Whether or not the interest was acquired in a wash sale.

(h) The allowed expenses, if any.

(i) The tax, if any, on each transfer.

* * * * *

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 11. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 4 percentum of the amount of the net income in excess of the credits against net income provided in section 25. (U. S. C., Title 26, Sec. 11.)

SEC. 21. "Net Income" means the gross income computed under section 22, less the deductions allowed by section 23. (U. S. C., Title 26, Sec. 21.)

SEC. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C., Title 26, Sec. 22.)

* * * * *

Silver Purchase Act, c. 674, 48 Stat. 1178, 1179:

SEC. 8. Schedule A of title VIII of the Revenue Act of 1926, as amended (relating to stamp taxes), is amended by adding at the end thereof a new subdivision to read as follows:

"10. Silver, and so forth, Sales and Transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed ex-

penses, 50 per centum of the amount of such excess. On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the tax thereon. Every such memorandum shall show the date thereof, the names and addresses of the transferor and transferee, the interest in silver bullion to which it refers, the price for which such interest is or is to be transferred and the cost thereof and the allowed expenses. Any person liable for payment of tax under this subdivision (or anyone who acts in the matter as agent or broker for any such person) who is a party to any such transfer, or who in pursuance of any such transfer delivers any silver bullion or interest therein, without a memorandum stating truly and completely the information herein required, or who delivers any such memorandum without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both. Stamps affixed under this subdivision shall be canceled (in lieu of the manner provided in section 804) by such officers and in such manner as regulations under this subdivision shall prescribe. Such officers shall cancel such stamps only if it appears that the proper tax is being paid, and when stamps with respect to any transfer are so canceled, the transferor and not the transferee shall be liable for any additional tax found due or penalty with respect to such transfer. The Commissioner shall abate or refund, in accordance with regulations issued hereunder,

such portion of any tax hereunder as he finds to be attributable to profits (1) realized in the course of the transferor's regular business of furnishing silver bullion for industrial, professional, or artistic use and (a) not resulting from a change in the market price of silver bullion, or (b) offset by contemporaneous losses incurred in transactions in interests in silver bullion determined, in accordance with such regulations, to have been specifically related hedging transactions; or (2) offset by contemporaneous losses attributable to changes in the market price of silver bullion and incurred in transactions in silver foreign exchange determined, in accordance with such regulations, to have been hedged specifically by the interest in silver bullion transferred. The provisions of this subdivision shall extend to all transfers in the United States of any interest in silver bullion, and to all such transfers outside the United States if either party thereto is a resident of the United States or is a citizen of the United States who has been a resident thereof within three months before the date of the transfer or if such silver bullion or interest therein is situated in the United States; and shall extend to transfers to the United States Government (the tax in such cases to be payable by the transferor), but shall not extend to transfers of silver bullion by deposit or delivery at a United States mint under proclamation by the President or in compliance with any Executive order issued pursuant to section 7 of the Silver Purchase Act of 1934. The tax under this subdivision on transfers enumerated in subdivision 4 shall be in addition to the tax under such subdivision. This subdivision shall apply (1) with re-

spect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply.

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